In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 843

DR. F. ALLEN RUTHERFORD, ET AL., PETITIONERS

v.

THE AMERICAN MEDICAL ASSOCIATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT EMPLOYEES OF THE UNITED STATES IN OPPOSITION

On January 3, 1966, petitioners[1] filed a complaint for injunctive relief in the United States District Court for the Northern District of Illinois under the provisions of the Sherman Antitrust Act (15 U.S.C. 26) and the civil rights statutes (42 U.S.C. 1983–1985).

As amended, the lengthy complaint alleged in essence that respondents[2] combined and conspired to

[1] Petitioners are a doctor and several cancer patients who brought this suit as a class action.

[2] Respondents include the American Medical Association, the American Cancer Society, the University of Illinois, and employees of the Federal Food and Drug Administration and the Public Health Service, as well as "other persons unknown." This memorandum is filed on behalf of the Federal employees named in the pleadings.

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discredit the medical efficacy of the alleged anti-cancer drug, Krebiozen, and to impede the interstate distribution of that drug to those who wished access to it. Petitioners alleged that the American Cancer Society (allegedly a part owner of the anti-cancer drug, 5–FU) secured a monopoly in the distribution of anti-cancer drugs and that the impediment to the interstate distribution deprived petitioners of their civil rights. The district court, without considering the merits of the allegations regarding a conspiracy, found that the sponsors of Krebiozen had never made a bona fide attempt to have the drug licensed for interstate distribution under the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 355(a)–355(i), and that it was this failure on the part of the sponsors to comply with the licensing procedures, rather than the alleged misconduct of respondents, which prevented and would continue to prevent the interstate distribution of Krebiozen. It found that an injunction against respondents would in the circumstances be futile. Accordingly, for this and other reasons, it dismissed the complaint.[3] The court of appeals affirmed.

There is no occasion for further review. The gravamen of petitioners' complaint is that Krebiozen is denied access to the channels of interstate commerce,

[3] Other reasons given for dismissal by the district court were the failure to state a cause of action under the civil rights statutes, the failure sufficiently to allege that the conspiracy would continue in the future, and the failure of the complaint to measure up to the basic precepts of pleading. The court did not consider the other serious questions, such as standing, venue, the propriety of the Rule 23 class action, and the adequacy of the cause of action framed under the Sherman Act.

and that, as a result, they are denied its use. As the court below stated, however, petitioners' request should be directed to the sponsors of the drug, rather than to respondents (Pet. App. 4). Unless and until the sponsors seek and obtain approval for interstate distribution under the applicable provisions of Federal law, petitioners will be unable to obtain the drug in interstate commerce.

Referring to excerpts from correspondence between the sponsors of the drug and the Food and Drug Administration, petitioners allege that all attempts to gain approval would be rejected (Pet. 13–15, 19–20, 31–34), and from this premise they seek judicial permission to have the drug shipped in interstate commerce without compliance with the statute and the regulations. All that the correspondence shows, however, is that the Food and Drug Administration, in rejecting "new drug" applications as incomplete, also suggested that the sponsors submit future applications to the Laboratory of Biologics Control.[4] This scarcely shows that a proper application, supported by the necessary data, would not be given proper consideration.[5]

In these circumstances, it is respectfully submitted that the complaint was properly dismissed, and that

[4] The suggestion was made on the basis of the sponsors' own supporting data to the effect that Krebiozen was an extract from the blood of horses, and as such was subject to the jurisdiction of the Virus, Serum and Toxin provisions of the Public Health Service Act of 1944.

[5] There is no application pending at this time.

the petition for a writ of certiorari should therefore be denied.

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